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No. 06-364

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IN THE

Supreme Court of the United States

THE DELAWARE NATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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ARGUMENT

Petitioner The Delaware Nation (the "Delawares") submits this reply in further support of its Petition for a Writ of Certiorari. Opposition briefs were only filed on behalf of the Honorable Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, and the Binney & Smith Defendants.[1] Those oppositions by and large avoid discussion of the important federal issues at the heart of the Delawares' petition. They summarily and wrongly dismiss as "hypothetical" and "academic" the issues raised by the petition, and instead make factual and legal arguments, which are not relevant thereto.

The important question here presented is whether the Indian Non-Intercourse Act, 25 U.S.C. § 177 (1799) (the "Non-Intercourse Act") should be interpreted to protect Indian land held in fee. Rather than addressing that issue, respondents erroneously argue that its determination is unnecessary because (1) Tatamy's Place was not "tribal land" and (2) the Delawares did not plead a "conveyance." They also misinterpret the holding of the Third Circuit Court of Appeals and mischaracterize applicable law, by erroneously asserting that the Third Circuit ruled that Tatamy's Place is not "tribal land" and wrongly contending that the Delawares were required to plead a "conveyance" to sustain their Non-Intercourse Act claims.

Governor Rendell and the Binney & Smith Defendants employ a similar tactic with respect to the issue of whether the Court of Appeals' waiver determination contravened the Indian Protection Act, 25 U.S.C. § 194 (2003). They argue that the Court of Appeals correctly ruled that the Delawares waived the right to contest Thomas Penn's alleged sovereign status on appeal, without addressing either the record or the federal statute that precludes such a ruling. They disregard the Delawares'

1. The term "Binney & Smith Defendants" refers collectively to defendants/ respondents Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers, Inc., Daniel O. Lichtenwalner and Joan B. Lichtenwalner, all of whom are represented by the same counsel in this litigation.

repeated objections in the district court to defendants' introduction of extraneous facts in support of their dismissal motions. Respondents raise erroneous factual issues to attempt to convince this Court that Thomas Penn, not the King of England, was the sovereign of colonial Pennsylvania. Besides being inaccurate, those factual issues are inapposite to the key question of whether the district court's waiver determination violated federal Indian law and policy.

Both issues raised in the Delawares' petition are of great import to all Native Americans. Those issues should also be addressed to ensure that the Delawares' claims in this litigation are fully and fairly resolved.

I. The Non-Intercourse Act Protects Indian Tribes And Indians From The Improper Divestiture Of Indian Land Held In Fee

A. The Court of Appeals Did Not Determine That Tatamy's Place Was Not "Tribal Land"

Governor Rendell and the Binney & Smith Defendants contend that the question of whether the Non-Intercourse Act applies to Indian land held in fee would be a mere academic exercise in the context of this case. *See* Opposition Brief of Governor Rendell at 8; Binney & Smith Defendants Brief at 4. Supposedly, the Court of Appeals did not need to reach this unsettled issue because it determined that Tatamy's Place was not "tribal land." The Court of Appeals, however, made no such determination.

The Delawares' claim to Tatamy's Place is based on alternative theories: (1) that the land patents from the Proprietaries of Pennsylvania conveyed fee title to Chief Tatamy as a tribal representative, and (2) that even if the patents conveyed fee title to Chief Tatamy in his individual capacity, the Delawares are his exclusive heirs. The Court of Appeals rejected the Delawares' contention that Chief Tatamy received fee title as a tribal representative (Pet. App. 15a.), but did not consider or resolve whether the tribe owned the land as Chief

Tatamy's heir. The Court of Appeals never concluded Tatamy's Place was not tribal land. *See* Pet. App. 15a-17a.

For purposes of defendants' motions to dismiss, the Delawares' allegations that they are Chief Tatamy's heirs should have been accepted as true. Those allegations are based on the Indian law and tradition of the Delawares. This Court long ago held that the right of inheritance of Indians is controlled by the laws, usage and custom of the tribe. *Jones v. Meehan*, 175 U.S. 1, 30-32 (1899). Under the tradition of the Delawares, upon the death of an individual Indian, ownership of property does not devolve to that individual's family members, but to the tribe. *See, e.g., Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196 (1894) (property does not pass to heirs specifically but to all tribe members communally).

Having determined that the patents transferred fee title to Chief Tatamy individually,[2] it was incumbent upon the Court of Appeals to resolve the Delawares' alternative claim. To do so, the Court of Appeals needed to reach the unsettled question of the applicability of the Non-Intercourse Act to fee title. That question is an important federal question, which merits this Court's review.

The import of the resolution of this issue to this case is undeniable. If the Non-Intercourse Act protects fee title, and if the Delawares are able to prove they are Chief Tatamy's heirs as they allege, then the Delawares are entitled to regain possession of Tatamy's Place and to recover damages from defendants. *See County of Oneida v. Oneida Nation of New York State,* 470 U.S. 226, 234-236 (1985). The Delawares are also entitled (1) to have the private purchases of Tatamy's Place declared null and void, *see, id.* (citing *Marsh v. Brooks*, 49 U.S. 223, 8 How. 223, 232, 12 L. Ed. 1056 (1850)); (2) to eject the current occupants, *see id.* (citing *Johnson v. McIntosh*, 21 U.S. 549 (8 Wheat.) 543, 5 L. Ed. 162 (1810)); and (3) to obtain an

2. The Delawares do not contest this aspect of the Court of Appeals' decision in their petition.

accounting of all rents, issues and profits against the trespassers on their land, *see id.* at 235-36 (citing *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941)). The resolution of this important federal issue is thus neither "academic" nor "hypothetical" to the proper resolution of the Delawares' claims.

B. The Non-Intercourse Act Does Not Require The Delawares To Allege A Conveyance To State A Valid Claim

Governor Rendell's opposition brief also attempts to divert attention from the important federal issues raised in the petition by arguing that the Delawares do not have viable claims because they do not allege an unlawful conveyance of Tatamy's Place. In making that argument, which the Court of Appeals did not resolve, the Governor seeks to impose a requirement that does not exist under well established case law.

To state a claim for a violation of the Non-Intercourse Act, a plaintiff must plead (1) it is an Indian tribe; (2) the land in question is tribal land; (3) the United States never consented to or approved of the alienation of the land in question; and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. *Golden Hill Paugussett Tribe of Indians v. Weicher*, 39 F.3d 51, 56 (2d Cir. 1994) (cites omitted). This authority, which the Governor himself cites in footnote 2 on page 8 of his opposition brief, does not require the Delawares to allege a conveyance of land.

Although the law does not require the Delawares to allege a conveyance, they nonetheless allege that they have been dispossessed of Tatamy's Place. It is beyond dispute that the Delawares are no longer in possession of Tatamy's Place. They allege in their Complaint that Chief Tatamy and his family remained in possession of that property until at least 1800. *See* Complaint at ¶ 54. They also allege that in 1802, a deed purported to convey Tatamy's Place to Harry and Mathus Strecher. *See* Complaint at ¶ 56 and Exhibit G. It is also beyond dispute that the Delawares' title to Tatamy's Place was never defeased by a

federal treaty as required by the Non-Intercourse Act. Thus, even if there were a conveyance requirement, the Delawares met that requirement in their Complaint.

II. The Court of Appeals' Conclusion That The Delawares Waived The Right To Contest The District Court's Finding That Thomas Penn Was Sovereign Contravenes Federal Law And Policy

Governor Rendell and the Binney & Smith Defendants also argue the Third Circuit Court of Appeals' waiver determination does not present a federal question worthy of this Court's review and that it is, in any event, inconsequential to the outcome of this case. *See* Opposition Brief of Governor Rendell at 12; Opposition Brief of Binney & Smith Defendants at 11. Their arguments mischaracterize both the importance of the strong federal policy in favor of Indians in land-claim litigation and the erroneous basis of the Court of Appeals' decision.

A. The Court of Appeals' Waiver Decision Contravenes Federal Law And Policy

The Court of Appeals incorrectly ruled that the Delawares waived their right to contest the district court's factual determination that Thomas Penn was sovereign. In so doing, that court violated federal Indian law and policy.

Both Governor Rendell and the Binney & Smith Defendants argue that Governor Rendell raised Thomas Penn's alleged sovereignty in a footnote in the brief in support of his dismissal motion and that the Delawares did not object to that factual conclusion. That factual contention is one of numerous "facts" that defendants-respondents improperly interjected into their seven dismissal motions. The jurisprudence surrounding Rule 12(b)(6) of the Federal Rules of Civil Procedure establishes beyond doubt that defendants must accept a complaint's allegations as true in moving to dismiss. *E.g.*, *Flohr v. Pennsylvania Power & Light Co.*, 800 F. Supp. 1252, 1254 (E.D.Pa. 1993) (citing *Estate of Baily by Oare v. York County*, 768 F.2d 503, 506 (3d Cir. 1985); *Helstoski v. Goldstein*, 552

F.2d 564, 565 (3d Cir. 1977) (*per curiam*)). Rather than respond to each improper factual issue raised by defendants, the Delawares objected (repeatedly) to the district court's consideration of all facts not contained in the Complaint. The Court of Appeals' waiver determination is, therefore, clearly erroneous.

The Court of Appeals' waiver ruling also violated federal Indian law and policy. The general rule that appellate courts will only consider issues raised in the district court is a rule of discretion, not jurisdiction. *Selected Risk Ins. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983) (cites omitted). Appellate courts have the discretion to address substantive issues on appeal where the question is essentially legal and the record is clear and complete. *Petitioning Creditors of Melon Produce, Inc. v. Braunstein*, 112 F.3d 1232, 1236 (1st Cir. 1997). The strong federal policy in favor of Indians in land-claim litigation with non-Indians required the Court of Appeals to review this issue.

Under federal common law and Section 194 of the Indian Protection Act, once a tribe makes out a *prima facie* case of prior possession or title to the property in dispute, the non-Indians bear the burden to demonstrate otherwise. *See* 25 U.S.C. § 194 (2003); *see also Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128, 135 (N.D.N.Y. 2004) (cites omitted). To establish aboriginal title, an Indian tribe must show that it actually, exclusively, and continuously occupied and used property for an extended period of time. *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241, 243 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *see also Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313, 343 (N.D.N.Y. 2003) (Indian tribe obtains aboriginal title when it uses and occupies property to the exclusion of other Indian tribes or persons); *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 503 (W.D.N.Y. 2002). In their Complaint, the Delawares alleged the requisite elements to state a *prima facie* case for aboriginal title.

The district court did not dismiss the Complaint because the Delawares failed to plead these basic elements. Rather, the district court dismissed because it found — based on allegations not contained in the Complaint — that Thomas Penn was a sovereign vested with the right to extinguish aboriginal title. Because the Delawares state a *prima facie* case for aboriginal title, defendants had the burden of production and persuasion under Section 194 to prove their defenses, including Thomas Penn's alleged sovereign status. In the context of Rule 12(b)(6), defendants cannot defeat a plaintiff's *prima facie* case by averring extraneous facts. *See, e.g., Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (citing *Castle v. Cohen*, 840 F.2d 173, 179-80 (3d Cir. 1988) (reversible error for district court to consider extraneous facts on motion to dismiss without providing notice to the parties of conversion to a summary-judgment motion).

By failing to review the district court's dismissal of the Delawares' aboriginal claims based on Thomas Penn's alleged sovereign status, the Court of Appeals violated the above stated federal policy and law. The application of Section 194 is an important federal issue that deserves review by this Court. Correctly applied to the facts of this case, Section 194 mandates that the defendants prove at trial (not by asserting extraneous evidence in a dismissal motion) the Delawares' aboriginal rights were divested by the act of a sovereign.

B. The Determination Of Sovereignty Raises Questions Of Fact, Which Should Not Have Been Resolved Under Rule 12(b)(6)

As they did in their dismissal motions and appellate briefs, respondents make factual arguments in their opposition briefs in support of Thomas Penn's alleged sovereignty. Besides being inconsequential to the federal issues raised by the pending petition, defendants' factual arguments are simply incorrect. Further, the inaccuracy of those facts serves to highlight the necessity of the federal policy to protect Indians in land-claim litigation with non-Indians.

Governor Rendell focuses on provisions of the Charter of 1681, which granted William Penn the right to convey property. *See* Opposition Brief of Governor Rendell at 17. The plain language of the Charter makes clear that Penn received the right to convey *fee* title, also known as the right of preemption. However, the right of preemption and the right of extinguishment are separate powers and need not be held by the same entity. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810); *see also Oneida Indian Nation of State of New York v. County of Oneida*, 414 U.S. 661, 667 (1974).

In the Charter of 1681, William Penn received fee title along with the right "to take or purchase, their heires and assignee, in ffee [sic] simple or ffee [sic] tail or for the term of life or lives or years." Defendants mischaracterize these fee-title rights as encompassing the right of extinguishment. In doing so, defendants ignore express language in the Charter stating that the Crown is "Saving also, unto Us, Our heires and Successors, the Sovereignty of the aforesaid Countrey."

The Crown's delegation of certain self-governing powers to its colonies does not alter this result. Historian Jack P. Greene notes that notwithstanding

> the extensive self-governing powers actually exercised by the colonies under their charters, English monarchs and their advisers never wavered in their insistence that "such inferiour dominion[s]" [*i.e.*, the colonies] had to remain subordinate to the "Dominion Superiour" [*i.e.*, the Crown].

Greene, Jack P., *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1697–1788*, Athens and London: The University of Georgia Press, 1986. Under the "doctrine of discovery" England, as the discovering nation, held the right of extinguishment and thus "had the exclusive authority to extinguish aboriginal title." *Seneca Nation of Indians v. New York*, 206 F.Supp. 2d 448, 505-06 (W.D. N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004). None of the powers cited by the Binney

& Smith Defendants in their opposition briefs can be remotely construed as conveying the right of extinguishment to William Penn and his heirs. *See* Opposition Brief of Binney & Smith Defendants at 14-15.

Similarly, the Binney & Smith Defendants' argument, based on the charter for New York and New Jersey, does not support the conclusion that Thomas Penn received the right of extinguishment. *See* Opposition Brief of Binney & Smith Defendants at 15-16. The case quoted by the Binney & Smith Defendants, *Martin v. Waddell*, 41 U.S. 367, 412 (1842), does not relate to the issue of the right of extinguishment. Further, it discusses a different charter from a different time period.

Defendants' suggestion that all charters were identical and that the Crown dealt with all colonies in a uniform fashion lacks historical support. *See* Hafffenden, Philip S., *The Crown and the Colonial Charters, 1675 – 1688: Part I*, The William and Mary Quarterly, 3rd Ser., 15(3) at 308 (July, 1958) (stating that greater limitations were imposed "upon the power and authority of the proprietor [*i.e.*, William Penn] than had been employed in granting of earlier charters"). The Crown did not treat all colonies in an identical manner. Nor can it be assumed that all treaties entered into by William Penn and his heirs uniformly received approval from the King of England.

The determination of the alleged sovereignty of Thomas Penn raises questions of fact, which defendants bear the burden of proving. *See* 25 U.S.C. § 194. The Charter of 1681 clearly states that the King of England retains sovereignty over colonial Pennsylvania. Although William Penn and his heirs were not mere private land owners, as respondents point out in their opposition briefs (Governor's Opposition Brief at 16-18), none of the delegated powers include the sovereign right to extinguish aboriginal title.

These factual issues accentuate the inappropriateness of the district court's dismissal order and the Court of Appeals' waiver determination. According to the Indian Protection Act, *supra*,

defendants-respondents bear the burdens of production and persuasion on this and other issues. A trial on the merits is the proper venue to resolve such matters.

C. The Resolution Of The Delawares' Claims Does Not Put In Question All Land Obtained From Indians By William Penn

Governor Rendell and the Binney & Smith Defendants argue that if the Delawares are correct that the King of England (not William Penn and his heirs) was the sovereign of colonial Pennsylvania, then all of Pennsylvania may be subject to reclamation claims by Indian tribes. Respondents' argument ignores the fact-sensitive nature of all Indian land claims. The only facts at issue in this litigation are those surrounding the Delawares' rights to the 315 acres in Northampton County, Pennsylvania known as Tatamy's Place. The Delawares aver in their Complaint that the Proprietaries, including Thomas Penn, had the right to convey fee title (*i.e.*, the right of preemption), but not to extinguish aboriginal title. That right remained with the King of England as sovereign. Whether the King extinguished the aboriginal rights of Indian tribes as to any other land in colonial Pennsylvania, is simply not at issue in this case. Moreover, the King of England's sovereignty over colonial Pennsylvania ended with the Revolutionary War. Thus, this case does not raise the issue of whether aboriginal rights to land other than Tatamy's Place were extinguished by the sovereign after the formation of the United States of America.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Delaware Nation's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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